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November 30, 2021

VIA ECF

The Honorable Frederic Block
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 10007

Re: Tanya Asapansa-Johnson Walker, et al. v. Xavier Becerra, et al, *No. 20-cv-02834 (FB) (SMG)* (the “Action”)

Dear Judge Block:

On behalf of the parties to the Action, the undersigned counsel respectfully submit this joint status update to the Court and request that the Court enter a stay of the Action to allow Defendants time to issue a Notice of Proposed Rulemaking, which would address the Defendants’ prior rule at issue in this Action entitled *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020) (the “2020 Rule”).

A. Status Update

As Defendants’ counsel previously informed the Court, on May 10, 2021, HHS issued its “Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972,” indicating that “consistent with the Supreme Court’s decision in *Bostock* and Title IX,” the Department of Health and Human Services “will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.” 86 Fed. Reg. 27,984, 27,984 (May 25, 2021). (*See* Doc. 39.)

Subsequently, the parties to the Action agreed to a dismissal with prejudice of Defendants’ appeal of this Court’s preliminary injunction staying enforcement of certain portions of the 2020 Rule. Defendants dismissed the appeal on November 22, 2021.

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Further, Defendants have represented that they will issue their Notice of Proposed Rulemaking (“NPRM”) no later than April of 2022.

B. Requested Stay

The parties respectfully request the Court stay this Action through the earlier of either (a) May 2, 2022; or (b) 30 days after issuance of the NPRM, without prejudicing either party’s ability to seek a continuation of the stay. A stay of the Action will provide Defendants with time to issue the forthcoming NPRM, while preserving the injunction protecting Plaintiffs and their right to seek additional relief should any need arise.

The stay would also place the Action into a similar posture as the other suits challenging the 2020 Rule. *See Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth et al. v. United States Dep’t of Health & Hum. Servs. et al.*, Case No. CV 20-11297-PBS (D. Mass. Oct. 29, 2021) (ECF No. 83) (entering stay until end of April 2022 “without prejudice to moving for relief upon a showing of irreparable harm” and ordering a status conference for May 5, 2022); *Whitman-Walker Clinic et al. v. United States Department of Health & Human Services et al.*, Case No. 1:20-cv-01630 (D.D.C. Nov. 3, 2021) (adopting status report on continued stay and ordering new joint report be filed by January 31, 2022).¹

The parties believe the stay outlined above is in the best interest of protecting their respective rights while also serving the interest of judicial economy pending the forthcoming NPRM. Should the Court have any questions or concerns about the requested stay, the parties are happy to appear for a telephonic status conference.

[signatures on the following page]

¹ The last filing in *State of New York et al. v. United States Department of Health and Human Services et al.*, S.D.N.Y. Case No. 1:20-cv-5583, was an August 23, 2021 Joint Motion for Stay of Proceedings and to Hold the Parties’ Motions in Abeyance, seeking a stay of the case through 30 days after conclusion of HHS’s rulemaking proceedings. (Case No. 1:20-cv-5583, Doc. 145.)

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Sincerely,

/s/ Edward J. Jacobs

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